FEDERAL FARM LOAN ACT CASE.

Supreme Court of the United States.

OCTOBER TERM, 1920; No. 199.

CHAS. F. SMITH, *Appellant,*

vs.

KANSAS CITY TITLE & TRUST CO., ET AL., *Appellees.*

Appeal from the District Court of the United States for the Western Division of the Western District of Missouri.

ON RE-ARGUMENT.

BRIEF FOR APPELLANT

In support of the contention that the Federal Farm Loan Act is unconstitutional.

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ON RE-ARGUMENT.

BRIEF FOR APPELLANT.

This case was argued January 6-8, 1920. Upon April 26, 1920, a re-argument was ordered. It is not necessary to repeat the facts stated in the brief originally filed.

The sole question involved is the constitutionality of the Act of July 17, 1916, as amended January 18, 1918 (39 Stat. 360; 40 Stat. 431), known as

THE FEDERAL FARM LOAN ACT.

The Act's elaborate provisions were so carefully analyzed in the various briefs filed upon

the former argument, that a summary statement of its salient features will be sufficient for testing its constitutional validity.

I. FEDERAL LAND BANKS.

1. The Act provides for the creation of twelve Federal Land Banks, each with a capital stock of $750,000, which are authorized to do four things:

First: To lend money to farmers, on farm mortgages at a low interest rate, repayable in from five to forty years by small annual amortization payments.

Second: To issue and sell to the investing public, the Bank's own collateral trust bonds called "Farm Loan Bonds," secured by the individual farm mortgages.*

Third: To buy and sell United States bonds.

Fourth: To act as depositaries of public money and as financial agents of the Government, when so designated or required by the Secretary of the Treasury; but no Government money so deposited shall be invested in mortgage loans or Farm Loan

*The insignificant capital of the Banks would be quickly exhausted by the first loans and (as deposits could not be accepted,) the only way the banks could obtain funds with which to make further loans, would be by selling the mortgages they had already taken. Instead of selling the individual mortgages, the Collateral Trust Bond was adopted as more likely to prove attractive to the investing public.

> Bonds, or in any other security except United States bonds.

On the other hand, these institutions while *called* "Banks," are prohibited from doing any of those things which constitute the very essence of a bank, to wit: each Bank is *prohibited* from accepting any deposits (except from its own stockholders, *i. e.,* Farm Loan Associations who, being organized solely and exclusively as borrowers, are not likely to be depositors to any extent), from paying any interest on deposits, from discounting paper, dealing in money, gold, silver, foreign or domestic exchange, stocks, bonds (except United States bonds), and from doing anything in the nature of a banking business, or from investing its funds in anything except farm mortgages, Farm Loan Bonds, or Government bonds; it being specifically prohibited from transacting any banking or other business not expressly authorized by the Act. (§ 14.)

Complete *tax exemption* is given; the States are forbidden to tax the Banks, the farm mortgages, or the Farm Loan Bonds, which are declared to be (§ 26)

> "*instrumentalities of the Government of the United States,* and as such they and the income derived therefrom, shall be *exempt* from Federal, State, municipal and local taxation."

2. The 12 Federal Land Banks were organized; and as the public took but a small amount of the stock, the United States temporarily subscribed for nearly $9,000,000 stock, under a provision for its gradual retirement, so that in a few years the United States will have no financial interest in the Banks, which will be owned exclusively by the borrowing farmers, thus imparting a co-operative or mutual feature to the management of the Banks.

Under that plan, over $2,000,000 of the Government's temporary stock has been paid off; and the aggregate capital of the 12 Banks is now (October 1, 1920) about $24,500,000, of which the United States owns but $6,800,000.

None of the Banks have ever been designated as depositaries of public money, nor employed as financial agents of the Government, except that three of the Banks assisted in making some seed grain loans to farmers out of the President's $100,000,000 war fund. (R. 10.)

The 12 Banks have issued about $325,000,000 of their own collateral trust obligations called Farm Loan Bonds, of which about $176,000,000 were purchased and are held in the Treasury of the United States under the amendments of January 18, 1918 and May 26, 1920.

In other words, the money raised by the Government for war purposes through taxation and the sale of Liberty Bonds, and the recent 6 Per Cent Treasury Certificates of Indebtedness, has, to the extent of about $176,000,000 been devoted to the purchase of Farm Loan Bonds in order to furnish the funds to lend to farmers at very low rates of interest, and to afford a tax free investment for wealthy persons. (R. 9.)

No constitutional objection is made to this use of Government money, as it can, perhaps, be sustained under the power of appropriation.

The attack on the Act relates solely to the bonds sold to *private* investors.

The nullification of the Act as to them would *not* cause the bonds heretofore issued to be worthless or even a loss to the private holders thereof (as the farm mortgages are a valid security), but it would merely subject them to State and Federal taxation.

THE TAX EXEMPTION IS THE REAL ISSUE SOUGHT TO BE SETTLED HERE.

II. JOINT STOCK LAND BANKS.

The Act also provides that *any* ten persons can organize a Joint Stock Land Bank, which is authorized to lend money to *any person*, for *any*

purpose, in *unlimited* amounts, on farm mortgages; and that the Bank can then issue its own collateral trust bonds, called "Farm Loan Bonds, which are to be secured by the deposit with a trustee, of the original farm mortgages and notes. (§ 16.)

The Act expressly provides that the Joint Stock Banks shall have *no power* (§ 16)

> "*to receive deposits** or to transact any *banking* or other business not expressly authorized by the provisions of this Act."

The only business "expressly authorized" by

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*While a Federal Land Bank is prohibited from accepting deposits from anyone "*except* from its own stockholders" (§§ 13, 14) the prohibition against a *Joint Stock Bank* accepting deposits is *absolute and unqualified.* (§ 16.) Hence Joint Stock Banks cannot even accept deposits from their own stockholders. Indeed the Federal Land Banks cannot accept deposits from their few individual stockholders, but only from the National Farm Loan Associations which are organized solely to enable loans to be secured, and their deposits, if any, must be invested in Farm Loan Bonds only. (§ 11.)

It has been suggested that because § 16 provides that Joint Stock Banks shall have the powers of, and be subject to the restrictions and conditions imposed on, Federal Land Banks "except as otherwise provided," and "so far as such restrictions and conditions are applicable," that therefore, the Joint Stock Banks are also entitled to receive deposits from their own stockholders. The power cannot be conferred upon them by any such an involved construction by reference.

A *subsequent* portion of the same section provides expressly that they shall have *no power to receive deposits;* and this prohibition is *absolute* as to Joint Stock Banks, while it is expressly *qualified* as to Federal Land Banks by permitting the latter to receive deposits from their stockholders. Therefore Joint Stock Banks do *not* have the same power as Federal Land Banks with respect to deposits.

the Act (except to lend on farm mortgages and to issue its bonds secured thereby) is (1) that they may buy and sell Government bonds, which anyone may do; and (2) a potential possibility of acting as depositary or financial agent for the Government under § 6, which was inserted in an effort to make the Act constitutional.

27 Joint Stock Banks have been organized, with $8,000,000 capital stock which is wholly owned by *private persons,* who are operating them *"purely and exclusively for their own individual and private profit* as in the case of any other purely private corporation." (R. 5, 9.)

None of those Banks have ever been designated as depositaries of public money nor have they ever performed any duties as financial agents of the Government. (R. 10.)

The Federal Government can never have any financial interest in these Banks; nor can the Banks receive deposits, discount paper, lend money, deal in gold, silver, stocks, bonds (except U. S. bonds), foreign or domestic exchange, or do any of the other things which constitute a banking business.

They have taken $80,000,000 of farm mortgages, and have issued against them about $60,000,000 of Farm Loan Bonds.

Nevertheless, the mortgages taken and the Farm Loan Bonds issued by these exclusively private money lending companies, are wholly exempted from every form of State and Federal taxation, § 26 providing that they

> "shall be deemed and held to be *instrumentalities of the Government* of the United States, and *as such they and the income derived therefrom, shall be exempt from Federal, State, municipal and local taxation.*"

How can (*a*) farm mortgages executed to a *privately* owned corporation and (*b*) the latter's obligations when held by *private* investors, be deemed "*instrumentalities* of the Government of the United States," and, *hence,* with the income therefrom, be *exempt from State taxation?*

Can the constitutionality of an Act authorizing *private* individuals to engage in the *private* business of lending on farm mortgages for *private* profit, be sustained (and their obligations when sold and owned by *private investors,* be exempted from all State taxation) by the simple expedient of *calling* them "instrumentalities of the Government" and of *authorizing* the Secretary of the Treasury to use them as Government depositaries or financial agents, although he has

never in fact so used them? If so, what limit remains on the powers of Congress?

The Joint Stock Banks while *more* limited in their *banking* powers (because they cannot receive any deposits) than even the Federal Land Banks, yet have much *broader* powers than the latter for *lending* on farm mortgages; and it is apparently only a question of a short time until the Joint Stock Banks will have monopolized the field from the Federal Land Banks. (Report, Secretary of Treasury, 1919; Finance, p. 137.)

The Meaning, Purpose and Object of the Act.

1. The Reports of the Committees, the Debates in Congress, the Government's authorized announcements, and the Briefs of opposing counsel on the former argument, all unite in the declaration that the sole meaning and purpose of the Act was to enable *private investors* to furnish money on farm mortgages at *low* interest rates and on long terms of repayment, or, as more tersely expressed, cheap money on easy terms on farm mortgages.*

*See the Appendix to Mr. Bullitt's Brief on the former argument. Senate Report No. 144, 64th Cong. 1 Sess.; House Report No. 630, p. 2, 64th Cong. 1 Sess.; 53 Cong. Rec. 7228, 7246, 6793; Farm Loan Board's Circulars Nos. 1, 2 and 3; Farm Loan Primer, p. 3; 1st Annual Report of Farm Loan Board, pp. 13, 17, 22; Brief of Judge Hughes p. 16; Messrs. Wickersham and McAdoo p. 19; U. S. as *amicus curiae* pp. 12, 18.

2. The *object* of the Act (sought to be obtained through those means), was, as stated at the former argument by the counsel supporting its validity,

> To foster, promote and stimulate the development of agriculture by the actual cultivation of the soil in a systematic manner throughout the country (Hughes, pp. 7, 16, 22, 45, 50, 54; Wickersham, pp. 19, 38).

3. But as the Constitution contains no *express* power for Congress (*a*) to stimulate or develop agriculture, (*b*) to regulate farm mortgages or to provide the means for securing low interest rates thereon, or (*c*) to create a corporation for the purpose of lending on farm mortgages, or issuing its bonds secured thereby,—the first inquiry is whether the power to pass the Act is *incident* to some express power and appropriate to its execution; and, if so, what power? (*U. S.* v. *Harris*, 106 U. S. 629, 636; *Kansas* v. *Colorado*, 206 U. S. 46, 87-90; Cases collated in Brief submitted on reargument by Mr. Hagerman at pp. 29-42.)

4. The only powers of Congress which have ever been suggested as even remotely authorizing the Act are:

1. "To lay and collect taxes," with its

implied power "to appropriate" public money. (Art. I, § 8, clause 1.)

2. "To borrow money on the credit of the United States." (Id., clause 2.)

3. Those under which the National Banking System was created.

The arguments in support of the Act which are based on those powers will now be critically examined.

SUMMARY OF POINTS DISCUSSED.

FIRST POINT.

The Farm Loan Act, so far as it creates Federal Land Banks, is unconstitutional because Congress has no power to create a corporation for the purpose of conducting a farm mortgage loan business, or to exempt it from State control; and its constitutionality cannot be saved by treating it as an exercise of the congressional power (1) to appropriate money, or (2) to borrow money on the credit of the United States.

SECOND POINT.

Congress could not acquire the power (1) to create a series of corporations (Federal Land Banks and Joint Stock Land Banks) to engage in the business of lending private capital on farm mortgages, and (2) to exempt them from all State control, by the mere expedient of calling such corporations "Banks" and endowing them with the possibility of acting as depositaries of public money or financial agents.

THIRD POINT.

The farm mortgages executed to the Federal Land Banks and to the Joint Stock Land Banks, and the farm loan bonds issued by them respectively, and held by the general investing public, are subject to State taxation.

ASSIGNMENTS OF ERROR.

The Court erred in sustaining the constitutionality of the Federal Farm Loan Act, especially as applied to the tax exemption of Farm Loan Bonds. (R. 33.)

FIRST POINT.

The Farm Loan Act, so far as it creates Federal Land Banks, is unconstitutional because Congress has no power to create a corporation for the purpose of conducting a farm mortgage loan business, or to exempt it from State control; and its constitutionality cannot be saved by treating it as an exercise of the congressional power (1) to appropriate money, or (2) to borrow money on the credit of the United States.

The Government's principal argument in support of the Federal Land Banks is based upon the taxing power and the power implied therefrom to "appropriate" money; and it arises from the *accidental* fact that the Government temporarily subscribed for most of the capital stock of the Federal Land Banks after the general public had refused to take it.*

*Since then the Government's stock has been considerably retired, *while the private shareholders have increased until they hold nearly three times the value* of the Government stock. The aggregate capital stock is about $24,500,000 of which the United States owns only $6,800,000.

Before dealing with that contention it will be desirable to consider the nature and extent of Congress' power to tax and consequently, to appropriate money.

THE EXTENT OF CONGRESS' POWER TO APPROPRIATE MONEY.

Art. I, § 8, Clause 1, of the Constitution provides:

> "The Congress shall have Power *To lay and collect Taxes,* * * * *to pay the Debts and provide for the common Defense and general Welfare of the United States.*"

1. Although originally the subject of much discussion, it may be considered as settled that the italicized words did not confer on Congress any substantive power to provide for the country's general welfare, nor are they merely harmless introductory words limiting the subsequently enumerated powers.

The accepted view is that Congress has power to lay and collect taxes *for the purpose of* paying the debts and providing for the common defense and general welfare, thereby *qualifying the objects* for which taxes may be laid.*

*(Federalist No. 41; Jefferson's "Opinion on the constitutionality of a National Bank," Feb'y 15, 1791; Jefferson's letter to Gallatin, June 16, 1817; Madison's veto of the Bonus Bill, March 3, 1817; Monroe's veto of the Cum-

2. The views of Mr. HAMILTON, in his Report on Manufactures, have prevailed in actual practice, namely, that Congress can appropriate money raised by taxation for any purpose or object which it deems conducive to the *general* (as distinguished from *local*), welfare; and such action is almost, if not entirely, beyond the control of judicial power. While practically there are few, if any, limitations on the power of Congress to *appropriate* money, all the authorities are agreed that the power is *exhausted* upon the application of the money.

Mr. HAMILTON, in his Report on Manufactures (December 5, 1791) said:

> "It is, therefore, of necessity, left to the discretion of the National Legislature to pronounce upon the objects which concern the general welfare, and for which, under that description, an appropriation of money is requisite and proper. And there seems to be no room for a doubt that whatever concerns the general interests of learning, of agriculture, of manufactures, and of commerce, are within the sphere of the national councils, *as far as regards an*

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berland Road Bill, and his *"Views of the President of the United States on the subject of Internal Improvements"* May 4, 1822; Madison's letter to Stevenson Nov. 17, 1830; 3 Farrand's Records of Federal Convention 483; Story on Constitution, §§ 907-930; 1 Willoughby on Constitution §§ 22, 269; 1 Tucker on Constitution, §§ 222-223; 1 Hare's Am. Const. Law, 241-242; 1 Watson on Constitution 398; 10 Fed. Stat. Ann. 403 and authorities cited; *Van Brocklin v. Tennessee,* 117 U. S. 151, 158.)

> *application of money.* * * * No objection ought to arise to this construction, from a supposition *that it would imply a power* to do whatever else should appear to Congress conducive to the general welfare. *A power to appropriate money* with this latitude, which is granted, too, in express terms, *would not carry a power to do any other thing* not authorized in the Constitution, either expressly or by fair implication."

President MONROE, in his *"Views of the President of the United States on the Subject of Internal Improvements"* accompanying his veto of the Cumberland Road Bill (which is universally conceded to be the most thorough and elaborate view which has ever been taken of the subject of Congress' power to appropriate money) was of the opinion that Congress could appropriate money to any purpose which it deemed conducive to the general welfare, *but that it could go no further than to appropriate the money* and could not undertake the projects to which the money was applied.

After disposing adversely of Mr. MADISON'S contention that the power of appropriation was limited to the execution of the powers enumerated or implied therefrom, Mr. MONROE said (II Messages and Papers of the Presidents, p. 167):

> "If, then, the right to raise and appropriate

the public money is not restricted to the expenditures under the other specific grants according to a strict construction of their powers, respectively, is there *no limitation* to it? Have Congress a right to raise and appropriate the money to any and to every purpose according to their will and pleasure? They certainly have not."

He then argues that the money can be appropriated to any great national purpose including good roads, canals, foreign concerns, and says (p. 168):

"The right of appropriation is nothing more than a right to apply the public money to this or that purpose. *It has no incidental power, nor does it draw after it any consequences of that kind.* All that Congress could do under it in the case of internal improvements would be to *appropriate* the money necessary to make them. **For every act requiring legislative sanction or support, the State authority must be relied on.** The condemnation of the land, if the proprietors should refuse to sell it, the establishment of turnpikes and tolls, and the protection of the work when finished must be done by the State. To these purposes the powers of the General Government are believed to be utterly incompetent."

In his accompanying veto message Mr. MONROE said:

"A power *to establish* turnpikes with gates and tolls, and to enforce the collection of tolls

by penalties, *implies a power* to adopt and execute a complete system of internal improvement. A right to impose duties to be paid by all persons passing a certain road, and on horses and carriages, as is done by this bill, involves the right to take the land from the proprietor on a valuation and to pass laws for the protection of the road from injuries, and if it exist as to one road it exists as to any other, and to as many roads as Congress may think proper to establish. A right to legislate for one of these purposes is a right to legislate for the others. It is a complete right of jurisdiction and sovereignty for all the purposes of internal improvement, *and not merely the right of applying money under the power vested in Congress to make appropriations,* under which power, with the consent of the States through which this road passes, the work was originally commenced, and has been so far executed.

I am of opinion that Congress do not possess this power; that the States individually cannot grant it, *for although they may assent to the appropriation of money* within their limits for such purposes, they can grant no power of jurisdiction or sovereignty by special compacts with the United States. This power can be granted only by an amendment to the Constitution and in the mode prescribed by it."

ANDREW JACKSON, in vetoing the Maysville Road Bill, said with reference to the appropriation of money (Id., p. 488):

"*No aid can be derived from the intervention of corporations.* The question regards the

character of the work, not that of those by whom it is to be accomplished."

Mr. MADISON, in vetoing the Bonus Bill on March 3, 1817, said (Id., Vol. I, p. 584):

> "A restriction of the power 'to provide for the common defense and general welfare' to cases which are to be provided for *by the expenditure of money* would still leave within the legislative power of Congress all the great and most important measures of Government, *money* being the ordinary and necessary means of carrying them into execution."

In 1 Willoughby on the Constitution, it is said (Sec. 269):

> "In fact, however, the limitation that an appropriation should be for a public purpose has been without practical effect, as the courts have in no case attempted to hold invalid an appropriation by Congress on the ground that it has been for a purpose not public in character; and, as regards the restriction that appropriations shall be in aid of enterprises which the Federal Government is empowered to undertake, the doctrine has become an established one that Congress may *appropriate* money in aid of matters which the Federal Government is *not* constitutionally able to administer and regulate."

In 1 Hare's American Constitutional Law, pages 241-250, there is an admirable review of the whole subject, including many of the his-

toric instances involving the appropriation of money by Congress. He points out that the construction of railways, high roads, bridges and other internal improvements is derivable, *not* from the power to *appropriate money*, but from the war, postal and commerce powers. Referring to certain appropriations it is said:

> "In the greater number of the instances above referred to, the government did not act in its sovereign capacity, *but like a rich and public-spirited individual who draws his purse-strings for the common good;* and therefore they do *not* tend to show that Congress may, by virtue of the eighth section of the first article, devise internal improvements and enact such laws as are necessary and proper to render the scheme effectual.
>
> It is one thing to construct a highway by virtue of the power of eminent domain, and exercise an absolute jurisdiction over it when made, *and another to lay out a road through land acquired by purchase* with the consent of the state through which it passes. So Congress may well be entitled to *appropriate money* for public education, or even to build and endow colleges and schools, *and yet want the right to make attendance, compulsory and enforce it by fines or penalties.*"

It is also said:

> **"In other words, although the United States may go into the market and do whatever can be done by the use of money without the exercise**

of legislative, executive, or judicial power, they cannot, speaking generally and where there are no special grounds, do more."

In Tucker on the Constitution, Vol. 2, §§ 222-234, there is an elaborate consideration of the entire subject; and it is pointed out that if Congress, under the power of appropriation can supervise and intervene in the administration of the project to which the money is applied, our Government would be exercising a power not conferred upon it.

3. The extent of the power of appropriation has never been determined by this Court. (*Field* v. *Clark,* 143 U. S., 649, 695; *U. S.* v. *Realty Co.,* 163 U. S., 427, 433.)

But, for the purposes of this argument, we shall concede the right of Congress to appropriate public money to any purpose it may desire.

We shall, however, insist that the implied power to *appropriate* for the general welfare is limited to the *disbursement* of money, with such machinery for its application to the desired end as may be used *without the exercise of Federal power to abridge the reserved rights of the States or of the citizens thereof.*

The Government's argument is this:

I. That the agricultural interests of the country are of public national concern and relate directly to the "General Welfare"; that Congress has the power to appropriate the public money to such purposes; that long time farm loans at low interest rates stimulate the cultivation of the soil and secure agricultural development; and that hence Congress can appropriate money in order to lend it to farmers at low interest rates.

That the power of appropriation implies the right to create corporations as a proper means for making the appropriation effective; that the $9,000,000 temporary subscription by Congress to the capital stock of such corporations was simply an appropriation of public money to be loaned to farmers at low rates of interest.

That, under the power of appropriation, Congress can endow the corporation not merely with the powers necessary to carry out the Congressional appropriation itself, but also with such other powers as Congress may deem it desirable to confer, including the right to raise money from the investing public to be loaned by them to the farmers; that even in respect of such *private* operations the corporations so formed are

instrumentalities of the Federal government for carrying out Federal purposes; that, as such, neither the property nor the operations of such corporations can be taxed by the States; and that all mortgages executed to, and all bonds issued by, such corporations, *and held by private investors,* are instrumentalities of the Federal government, and exempt from State taxation. (See pp. 24-47, 81-102, *infra.*)

II. That under the power "to borrow money on the credit of the United States," Congress could authorize these corporations to borrow money from the public, and lend it on farm mortgages; and that the bonds held by the public could be exempted from State taxation. (See pp. 48-54, *infra.*)

III. That under the principles authorizing the creation of National Banks, Congress could create these corporations instrumentalities of the Government to act as possible depositaries of public money, or financial agents, and thereby authorize their issuance of Farm Loan Bonds. (See pp. 54-81, *infra.*)

We submit:

1. *The implied power of appropriation does not authorize the creation of Federal Land Banks to lend private capital on farm mortgages, nor the exemption of its obligations in private hands from State taxation.*

1. Never before in our constitutional history has it been suggested that the power to create a corporation could be deduced from the power of appropriating public money.

The United States subscribed largely to the capital stock of both the First and Second Banks of the United States. But neither HAMILTON, WEBSTER nor MARSHALL suggested that the creation of the Bank could be sustained under the power of appropriation, which was then, as here, exercised by a subscription to the Bank's capital stock; although, in the case of both Banks of the United States, the Government's subscription was absolute and permanent, whereas here it was purely accidental, *conditioned* on the public not subscribing for the stock, and *temporary*, as it is now in the process of rapid retirement. If the Government's argument were valid, would it not have occurred to some of those great minds?

It has never been mentioned in any work on Constitutional Law, so far as our reading goes. The Congressional Debates and Committee Reports (1915-1916) show that it was never relied

on, though many minds were seeking for some constitutional power on which to base the Act. It was first propounded on May 4, 1917 in an opinion by a distinguished lawyer rendered to a banking syndicate, in support of the tax exemption feature of the Farm Loan Bonds.

The fact that the power of appropriation has never before been relied on to support the authority of Congress to create a corporation is persuasive evidence that the *power of appropriation* cannot authorize the creation of these corporations, nor indeed *any* corporation except possibly one to *disburse* the money appropriated.

2. In every past instance, where Congress has created a corporation to engage in any activity, whether it be the construction or operation of railroads, the manufacture of ordnance or explosives, the building of a merchant marine, the improvement of navigable rivers, or the business of banking, the implied power to create it arose from some *express* power conferred upon Congress, such as to tax, to declare war, to regulate commerce, etc.

3. The Government contends that a corporation is merely a *means* selected for the execution

of a power by Congress. If Congress may *create* a corporation for this purpose, *a fortiori* it may use a corporation already created. (*U. S.* v. *Jones,* 109 U. S. 513, 520; *Holmgren* v. *U. S.,* 217 U. S. 509, 517; *Mulcrevy* v. *San Francisco,* 231 U. S. 669, 674.) The question is whether a corporation being selected incidentally as the *means* of effecting an appropriation, can be exempted from State taxation. If Congress appropriates money to better the morals of the people, it is certainly a public purpose. Can it, by giving $100,000 to the Salvation Army, the Y. M. C. A., Parochial Schools, or the Anti-Saloon League, thereby acquire the power to say, when the States can, or can not, tax those institutions?

This is not a fanciful suggestion. For more than 40 years, Congress has appropriated $10,000 annually (20 Stat. 467; raised to $50,000 August 4, 1919) to be paid to a Kentucky corporation, "American Printing House for the Blind," to assist in providing books for the blind.

Has Congress the power by virtue of this appropriation to exempt the "American Printing House for the Blind" from State taxes? And can it exempt from State taxation the bond and

mortgage representing capital loaned by private investors to the Kentucky corporation in order to purchase new property and to extend its factory.

4. In order to carry out the power of appropriation, Congress need not have created a corporation. It might have loaned the appropriated money directly to farmers through one of the Government bureaus. In that event, if the Government's contention is correct, it could have provided that all money loaned on farm mortgages should be exempted from State taxation.

If the power of appropriation authorizes Congress to exempt from State taxation the bonds and mortgages of the capitalist, it could equally have exempted from State taxation the farm lands. A State has as complete control over personal property within its limits as it has of real estate. If Congress can exempt the personal property (bonds and mortgages) from taxation, it can also exempt the land itself.

Throughout the Government's briefs, it is argued that the public purpose to be served by this Act is the encouragement and benefit to be given the farmer to induce him to cultivate the soil,

whereas the benefit of the tax exemption privilege inures *directly* to the bond holders, the private banker, and the mortgagee; and only *indirectly* to the farmer as the result of the bonus to his creditor. If Congress obtains the right to grant tax exemption by reason of the appropriation, and the appropriation was made to help the tiller of the soil, could not Congress also give exemption to the mortgagor, by providing, for instance, that the amount of the outstanding mortgage should be deducted from the assessed value of his land, for the purpose of State taxation? And yet, if Congress should attempt to provide that the States could not tax farm lands, would any court think of sustaining such an Act?

The development of agriculture is a public purpose; can Congress provide that all the crops raised from seed distributed by Congress shall not be taxed by the States?

The title of the Act does not indicate that it was intended primarily to benefit the farmer. The capitalist and the mortgagor is the one who reaps the benefit, if the title of the Act is a summary of its meaning. The farmer is not so much interested in the creation "of a standard form

of investment" in the form of a tax exempt bond, as is the money lender.

CONGRESSIONAL APPROPRIATION ACTS.

5. The Government has cited, with much apparent confidence, a long list of Congressional Acts appropriating aid to agricultural development.*

Although no constitutional support for the Farm Loan Act can be found in these various appropriation acts, they are of the greatest im-

*Most of the acts were simple appropriations of money for the "collection of agricultural statistics"; "to collect and report information"; for "investigating" the extent that arid lands might be redeemed by irrigation; "to conduct inquiries and scientific and technologic investigations"; "to inquire into the economic conditions"; "to investigate mineral fuels and unfinished mineral products belonging to, or for the use of, the United States;" "to buy and distribute seeds"; to print and distribute pamphlets. (5 Stat. 354; 9 Stat. 102; 11 Stat. 226; 12 Stat. 387; 12 Stat. 503; 12 Stat. 691; 21 Stat. 276; 23 Stat. 31-32; Id. 355; 25 Stat. 960; 26 Stat. 653; 34 Stat. 690; 37 Stat. 681; 39 Stat. 446-476; Id. 1134-1166; 40 Stat. 374; Id. 973-993); in the execution of all which acts, no power was withdrawn from the States or from the people; nor was the Federal government exercising any power thereunder which was not possessed by any individual merely engaged in spending money. Some of the acts cited were passed in pursuance of the express power to regulate commerce (23 Stat. 31, 355; 39 Stat. 446-476) or to declare war. (40 Stat. 374.) But where the expenditure of money also involved executive action that might operate upon persons or property within the State, it was provided that action should be taken *"in co-operation with the States concerned"* (40 Stat. 374; 39 Stat. 1166, 1167); while the appropriations under the Morrill Land Grant Act of 1862, were expressly conditioned upon "the *previous assent of the several States signified by legislative acts*?"

portance as illustrating the radical nature of the Government's contention.

The Government's argument is that under the power of appropriation, Congress can not only appropriate public money to accomplish a public purpose, but as an incident thereto, acquires such a dominion over the subject matter as entitles it to withdraw from State control the property of private persons devoted to the same public purpose; and, therefore, that Congress by appropriating money for loans to farmers in the hope of stimulating the cultivation of the soil, was authorized to withdraw from the taxing power of the States, money applied by private citizens to the same purpose.

If that argument be valid, let us see where it leads:

(*a*) Instead of exempting from State taxation the capitalist who furnishes the money to be loaned to the farmer, could not Congress have equally exempted the farmer himself from State taxes upon his land, at least to the extent of the mortgage? This would deprive the State of the power *pro tanto* to tax the land itself. If Congress can prevent the State from taxing the capitalist who really *lends* the money on the farm, it surely could permit the State to tax the cap-

italist, but *prevent* the State from taxing the farmer on the land itself, to the extent that the capitalist was taxed on the mortgage.

(*b*) When, in 1906, Congress appropriated enormous sums to prevent and suppress Smallpox, Yellow Fever and Cholera (36 Stat. 709) did Congress thereby acquire the right to prevent New York from taxing the funds of the Rockefeller Foundation similarly devoted to that precise purpose?

When Congress appropriated more than $1,000,000 for the relief of the floor sufferers (37 Stat. 633), could it have provided that all of the assets and funds of private agencies devoted to the same relief work, should be exempted from State taxation?

When Congress appropriated $3,500,000 for the eradication of the Foot and Mouth Disease, including payment for animals destroyed (39 Stat. 492, 1167; 40 Stat. 1006), could it have provided (*a*) that the funds of the Rockefeller Institute devoted to the same purpose should be exempted from State taxation? or (*b*) that the States could not exercise control over the animals affected with that disease, merely because Congress had appropriated money to deal there-

with, or (*c*) that Federal officials might kill any diseased animals?

When Congress appropriated money "to investigate explosives and peat" (37 Stat. 681), could it provide that all money employed by private persons in similar investigations should be exempt from State taxation? Or when Congress apporpriated money "for the introduction and protection of insectivorous birds" (12 Stat. 691) could it provide that all such birds owned by private persons should be exempt from taxation, or could it prescribe the open and closed seasons therefor?

When Congress appropriated mon[illegible] for the "improvement of tobacco and the methods of tobacco production and handling" and to "encourage the adoption of improved methods of farm management and farm practice," and for the "improvement of grasses, alfalfa, clover and other forage purposes" (38 Stat. 422-3), did Congress thereby acquire such control over tobacco, the methods of its production and handling, farm management, grasses, etc., as to authorize it to provide that all funds employed by private persons in a State for the production and handling of tobacco should be exempted from State taxation, or that private funds used

for the improvement of farm management should also be exempted from State taxation?

The Government's position cannot stop with the mere exemption of money from State taxation. If Congress, by the appropriation of money to a given purpose, acquires the right incidentally to control the application of other money to the same purpose, it can only be because Congress has thereby acquired jurisdiction over the purpose itself; and its power is not limited to the mere withdrawal of the State taxing power from the private funds devoted to it, but it may also withdraw the other powers of the State over such purpose and may introduce Congressional regulations over the whole subject.

(*c*) The Government's attempted distinction between the application of money and the control of the industry itself, is wholly illusory. If Congress can exempt mortgages and bonds representing loans by third persons to farmers, then, by an exact parity of reasoning, by appropriating money to be expended on some particular activity, Congress can provide that the States shall do nothing to interfere with private individuals doing the same thing that Congress was doing by appropriation. The Government's

argument is substantially that because Congress has appropriated money to be loaned on farm mortgages, it has monopolized to itself the field of farm mortgage lending to the extent of being able to prescribe that the States shall not interfere with that business when conducted by private individuals.

If Congress has the right to withdraw the State's great power of taxation from farm mortgages and the funds secured thereby, why may it not also withdraw from the power of the State the recording of mortgages, the procedure relative to the foreclosure thereof, and prescribe the foreclosure of farm mortgages and vest it exclusively in the Federal Judiciary?

6. While the power of appropriation would possibly authorize the creation of a corporation *to carry out the appropriation, i. e.,* the actual *application* of the money, yet it would not authorize the company to engage in forms of activity other than appropriate for the expenditure of the money nor afford a medium for the investment of purely private capital in private enterprises, such as farm mortgages. If a corporation may be the means by which appropriated money is disbursed, surely it cannot be used for

the purpose of enabling private individuals to lend their money to other private individuals.

It will always be borne in mind that we are here dealing only with the *power of appropriation* and not with those very different powers upon which the National Banking System was founded and for the beneficial accomplishment of which it was necessary to permit the banks to engage in private business. (See pages ....., ..., *infra.*) The power to create ordinary banks was not based on the power to appropriate money nor to provide for the general welfare, but was based upon the necessity of carrying on the fiscal operations of the government in exercise of its powers to tax, to declare war, etc. How can it be said that the creation of a corporation for the employment, on a gigantic scale, of *hundreds of millions of dollars* of private capital in the farm mortgage business is plainly adapted or really calculated to effect the appropriation of the $9,000,000 which the government temporarily subscribed to the capital stock?

In *McCulloch* v. *Maryland,* it was said, page 423:

> "Should Congress *under the pretext of executing its powers* pass laws for *the accomplishment of objects not intrusted to the Govern-*

> *ment* it would become the painful duty *of* this tribunal • • • to say that such an act was not the law of the land."

Under the *pretext* of executing its power to appropriate money is not Congress seeking to create a machine by which one class of citizens can lend money to other citizens and be exempted from the operations of State laws with respect thereto? The money-lending business was never intrusted to the Government.

In *Osborn* v. *Bank*, 9 Wheat., 738, at 861, it was distinctly held that if the Bank could carry out the purposes of the Government as competently *without* the right to do private business, as it could *with* such right, there would be great difficulty in sustaining the private features of the charter. Certainly a corporation organized for the purpose of carrying out the *appropriation* of public money could do so *without* the addition of the private business of farm mortgage lending.

7. Besides agriculture, there are many other subjects of national concern, such as education; the insurance of lives against death, disability and disease; the protection of property from fire; the conservation of natural resources; personal morality; the alleviation of poverty; and

the relations between society and organized labor—all of them are matters of internal policy exclusively reserved to the States.

If Congress, under the power of appropriation, temporarily exercised to a limited amount, can create a great system of private money lending, let us consider to what extent the power may be carried.

Life and Fire Insurance. Certainly the protection of property against fire and lives against death is a matter affecting everyone. By a small temporary appropriation to capital stock, can Congress acquire the power to create gigantic life and fire insurance companies in which private capital can find investment, where the corporation will furnish money to persons suffering losses from fire or death, in return for low premium rates? Would all the immense capital thus invested, and the payments received from the members and the investments thereof be exempted from State taxation? Would payments made by the corporation for death and fire losses, also be exempted from taxation including state inheritance taxes?

At the argument, the Government insisted that the Farm Loan Banks did not regulate any

matter reserved to the States, but only related to the *application of money*. It will be observed that such an insurance corporation is purely a *financial* one, doing nothing except to *receive and disburse* money.

Relief of China. Congress appropriated money for the relief of sufferers from famine in China (36 Stat. 919); and it might have created a corporation to expend that money in China. Could it have permitted private individuals to lend through that corporation vast sums to the Chinese for relief of the famine, to have taken mortgages on Chinese property, and to have exempted the principal from taxation by the States?

Public Disasters. In the case of the San Francisco earthquake Congress (1) appropriated $2,500,000 public money for the benefit of those whose property was destroyed, (§ 34 Stat. 644, 827), and (2) could have administered that relief through the medium of a corporation whose capital was subscribed by the Government; but could it provide that private individuals (a) might take stock in the corporation, and (b) also organize an independent corporation wholly owned by such private individuals; and that the two corporations thus organized

could lend money for the rebuilding of the destroyed districts, take mortgages therefor, issue collateral bonds against them, all of which should be exempted from State taxation?

Poverty, Unemployment and Industrial Relations. The development of our agricultural interests does not more clearly affect the general welfare, nor is it a more important public purpose than the alleviation of poverty and unemployment, and the maintenance of proper relations between capital and labor.

Congress appropriated large sums to be spent by a Commission to inquire into the general conditions of labor, agriculture, strikes, wages, health and other conditions existing between capital and labor (32 Stat. 758; 37 Stat. 415).

Instead of conducting this appropriation through a Commission, it might have done it through the medium of a corporation organized for the purpose, where the money appropriated constituted the capital stock. Could Congress under this alleged power of appropriation have authorized philanthropists to organize corporations by which immense sums of private capital might be devoted to those objects, including loans to the poor or unemployed, either without

security or secured by chattel mortgages, assignments of salaries, or of future earnings, etc., and could Congress have exempted from State taxation the capital thus invested in the notes taken. Or could Congress have authorized such philanthropists to have employed their funds through the medium of the corporation administering the appropriated public money and thus be exempted from State taxation?

Education. Everyone will admit that education no less than agriculture is a matter of national concern and welfare. Could Congress, by a similar temporary appropriation for capital stock, authorize the creation of a corporation to promote the cause of universal education, authorized to lend money at low rates to all persons building or operating school houses, colleges, technical or professional schools, securing the money by mortgages on the plants and on the tuition fees of the students? Could Congress exempt such bonds and mortgages from State taxation?

Could Congress have authorized Mr. Carnegie, Mr. Rockefeller and their associates to invest vast sums in mortgage loans through such corporation on the educational, technical and professional schools of the country, and exempt the

loans from State taxes? Could it thereby authorize those rich gentlemen to create a joint stock company with hundreds of millions of capital to be loaned or otherwise expended in building libraries and colleges, and in assisting persons engaged in educational work and to withdraw from State taxation all such funds, together with the mortgages executed in return for the loans?

Irrigation of Arid Lands. The irrigation of arid lands is a public purpose (*Fallbrook Irrigation Dist.* v. *Bradley,* 164 U. S. 112; *Hauck* v. *Little River Dist.,* 239 U. S. 254.) Could Congress, in order to stimulate the irrigation of arid lands (not public lands), authorize the creation of two classes of Irrigation Banks, one to which Congress would make a small temporary subscription for capital stock, and the other wholly organized by private individuals? And could it authorize those Banks to issue irrigation bonds secured by mortgages upon the proposed irrigated lands, which mortgages and the bonds should be exempt from State taxation? If so, what would become of the principles on which *Kansas* v. *Colorado,* 206 U. S. 46, 87-89, was based?

Conservation of Natural Resources. The con-

servation and development of coal, timber, water power, etc., are matters of great concern directly affecting the general welfare. Can Congress by small, temporary subscriptions to capital stock, authorize the creation of a "Conservation and Development Bank" to be engaged in the business of lending money at low rates to persons owning mines, coal and timber lands, water power rights, etc., taking mortgages therefor and issuing its collateral bonds against them, which mortgages and bonds, as well as the huge private investment, shall be exempt from all State taxation? Could Congress, without appropriating any money, also authorize private capital to organize Joint Stock companies to engage in the same business, exempting the bonds and mortgages from taxation?

Child Labor. Congress cannot regulate child labor. (*Hammer* v. *Dagenhart*, 247 U. S. 251.) Can Congress, under the power of appropriation, create a corporation in which private capital would have the principal investment, for the purpose of discouraging child labor in factories, by lending money at low rates of interest to those factories who would refuse to employ child labor? Could Congress exempt from State taxation the loans thus made and the mortgages

thus taken and the bonds issued against them? If so, the Congressional appropriation soon being returned to Congress (as the farm loan appropriation is being returned) we would shortly have huge mortgage lending companies assisting factories all of whose operations and investments would be exempt from State taxation.

Suppression of Vice and Elimination of Venereal Disease. Congress has no power to suppress Houses of Ill Fame. (*Keller* v. *United States*, 213 U. S. 138.*)

Can Congress, by the same expedient of a trifling appropriation, permit Mr. Rockefeller and his associates to organize a corporation having for its object the suppression of vice and the elimination of venereal disease, by means of loans at low rates, or bounties paid, to immoral people in order to assist them in abandoning their vicious careers and getting a new start in life?

Would the capital thus invested, the loans taken from the unfortunate people, and the bonds issued thereon be exempted from State taxation?

Manufactures. Whatever concerns manufactures is within the sphere of Congressional ac-

tion as far as regards the application of money (Hamilton's Report on Manufactures, December 5, 1791).

Congress could appropriate $9,000,000 temporary capital to start a corporation for the purpose of making cheap loans on factories or to encourage the building of new factories; but could it provide that the hundreds of millions of dollars of capital constantly invesfed in mortgages on industrial plants, might be loaned on the factories of the country by our capitalists through such a corporation, and that the bonds should be exempted from all State taxation?

Furthermore, as incidental to the corporation just mentioned, could Congress authorize our capitalists to organize an unlimited number of Joint Stock Factory Banks, through which they could lend their money to the industries of the country and exempt the loans from all State taxation?

Once concede that Congress has the power here claimed for it, and there is nothing to prevent Congress from extending the same system to all public utilities, department stores or any other matter of vital interest to the people.

We do not suggest any limitation upon the

power of Congress voluntarily to apply Federal money to the aid of any situation which Congress deems it wise to assist, but our criticism is that under the power of appropriation Congress cannot authorize private individuals to embark upon the same business and exempt them from the powers of the States, where such business bears no substantial relation to the execution of some Federal power.

8. The fallacy underlying the Government's entire argument is that it erroneously *assumes* that Congress has the power to provide financial aid for farmers in order to stimulate agriculture—as if that were a substantive power granted by the Constitution—from which erroneous assumption it deduces the logical conclusions (*a*) that Congress can furnish such aid in any way it deems best, and (*b*) that the means adopted in its discretion are Federal instrumentalities and consequently exempt from State taxation.

But it needs no argument to demonstrate that Congress has no power (in the sense used in the Goverment's argument) *to provide financial aid for the stimulation of agriculture.* No such power was given it by the Constitution. It may appropriate its money to that end and in only

that ambiguous sense has it the "power" to aid agriculture.

The fallacy lies in an erroneous assumption based upon the ambiguous use of the word "power."

The following quotations from Judge HUGHES' brief on the former argument reveal the fallacy in the use of the word "power."

> "Congress having power to provide financial aid in order to stimulate agricultural development throughout the country, could organize the means for providing this financial aid in any appropriate manner according to its judgment." (p. 54.)

Congress has power to *appropriate* money, but it has never been given the constitutional power *to stimulate agriculture* as a substantive power.

Again:

> "Congress was entitled in its discretion to establish the Federal Land Banks as means for the accomplishment of its end in providing financial aid to stimulate agricultural development in a systematic manner throughout the country." (p. 57.)
>
> "If Congress had the power to organize financial aid in order to stimulate agricultural development," etc. (p. 58.)

This shows that the Government *deduces the power to establish the banks* from the supposed

constitutional power to provide and organize financial aid for agriculture. That the Government's subscription to the capital stock is not defended as a mere *means* of appropriation, but as an incident to an alleged precedent power *to establish the Banks*, is shown by the following quotation:

> "*Having power* to establish these banks, *it was competent* for Congress to provide that the Treasury should subscribe to their capital stock. The banks were lawfully created and the stock could be taken as a lawful investment of public funds." (p. 57.)

In that argument the Government has placed "the cart before the horse." It might create a corporation in order to subscribe to the capital stock as a means of dispensing money appropriated to a particular object; but certainly the power of appropriation would not authorize it to create a corporation for any purpose other than the application of the money appropriated.

According to the Government's argument, as revealed in the above quotation, Congress might have established the banks and *never have subscribed for the stock at all.* If the Act had never provided for *any* Government subscription to the capital stock at all, we submit that there would have been no possible basis for the creation of the corporation.

2. *The power to borrow money on the credit of the United States does not authorize the issuance and sale of Farm Loan Bonds to private investors, nor the exemption thereof from State taxation.*

The Government contends that Congress has the power

> "To provide for bond issues to raise additional moneys, to be used in a general and systematic manner throughout the country to stimulate the cultivation of the soil." (Judge Hughes' Brief, pp. 22, 50, 51, 54, 58.)

This may be true, but only in the sense that Congress could authorize the issuance and sale of Government obligations and apply the proceeds in aid of agriculture.* That is not the case presented here.

How can it be said that the Farm Loan Bonds represent, in any way, the exercise of any power by Congress "to borrow money on the credit of the United States?" (Art 1, § 8, clause 2.)

1. Congress did not borrow the money. The

*It is possible that money so borrowed can only be applied in the execution of the *enumerated powers* of Congress, and those *implied* therefrom; that *borrowed* money cannot be applied for the "general welfare"; and, therefore, the *borrowing* clause cannot be relied on in order to furnish money for the general welfare. Furthermore, all money borrowed should first be placed in the treasury and then appropriated by law. (Constitution, Art. 1, § 9, clause 7.)

credit of the United States is not pledged. The United States is not liable on the bonds and has not promised to pay them.

Congress *voted down an amendment for the United States to guarantee the bonds,* which shows that it did not intend to be considered responsible therefor (56 Cong. Rec. 608, 609, 591; *U. S.* v. *Del. & Hud. R. R. Co.,* 213 U. S. 366, 414.)

The Government expressly disclaims any liability whatever on the bonds (Farm Loan Primer, Ans. 102).

None of the proceeds of the bonds belong in any way to the United States. The disposition of such proceeds is not made by Congress, but by the Directors of the Federal Land Banks who are not even public officials. Farm loan bonds are neither an asset nor liability of the United States.

2. Money obtained from private investors by the sale to them of bonds issued by the Federal Land Banks and secured by the farm mortgages of private farmers, is not money borrowed on the credit of the United States; and is not an exercise of the Congressional power to borrow money.

3. The Farm Loan Bonds are the obligation, not of the United States, but of the Federal Land Banks which are private corporations. They were issued by the Banks solely upon the faith and credit of the mortgages pledged to secure their payment, and of the joint and several liability of the various Land Banks, who by statute, are expressly made liable for the payment of the bonds.

The accidental, temporary ownership by the United States of stock in the Federal Land Banks cannot make the acts of the banks, the acts of the Government. Even in the case of The First and Second Banks of the United States, in which the Government was a large, permanent stockholder, and which were incorporated solely for the purpose of carrying out the express powers of Congress, it was held that none of the privileges of the Government were imparted to the Bank, but that the Government by becoming a stockholder, laid down its sovereignty so far as respects the transactions of the corporation. (*Bank of the U. S.* v. *Planters' Bank*, 9 Wheat. 904, 907.)

It is an established principle that the Government's ownership of stock in a bank does not make the act of the corporation that of the Gov-

ernment. (*Briscoe* v. *Bank of Kentucky*, 11 Peters, 257; *Bank of the U. S.* v. *Planters' Bank*, 9 Wheat. 904, 907; *Woodruff* v. *Trapnall*, 10 How. 190, 205; *Curran* v. *Arkansas*, 15 How. 304, 308-9; *Bank of Kentucky* v. *Wister*, 2 Peters, 318, 322; *Louisville R. R. Co.* v. *Letson*, 2 How. 497, 550.)

Notwithstanding the contrary view in Justice STORY's dissent, Justice MILLER's Lectures and Prof. Willoughby's textbook (quoted and relied on in Judge HUGHES' Brief) there has never been any disposition on the part of this Court to qualify the decision in the *Briscoe* case; but on the contrary, the declaration made by Chief Justice MARSHALL nearly 100 years ago in *Bank of the United States* v. *Planters Bank*, 9 Wheat. 904, 907, that:

> "It is we think a sound principle that when a Government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates, and to the business which is to be transacted. * * * As a members of a corporation, a Government never exercises its sovereignty. It acts merely as a corporator,

> and exercises no other power in the management of the affairs of the corporation, than are expressly given by the incorporating act.
>
> "The Government of the Union held shares in the Old Bank of the United States; but the privileges of the Government were not imparted by that circumstance to the Bank. * * * The Government, by becoming a corporator, lays down its sovereignty, so far as respects the transactions of the corporation, and exercises no power or privilege which is not derived from the charter."

has been reiterated many times and is to-day the principle controlling the rights of the United States when it becomes a stockholder of a corporation. (*Ches. & Del. Canal Co.* v. *U. S.*, 250 U. S. 123, 126.)

Consequently, when the United States became a stockholder in the Federal Land Banks their actions were not the actions of the Government, but were essentially the actions of the corporation alone. The ownership by the United States of the whole or any part of the capital stock of a corporation, whether chartered by the United States or by an individual State, does not operate to confer upon the corporation the privileges, prerogatives or immunities of sovereignty, or to make the action of the corporation in any sense the action of the Government.

This doctrine is strikingly illustrated in *Commercial Pacific Cable Co.* v. *Philippine Nat. Bank,* 263 Fed. 218, where cablegrams between the Bureau of Insular Affairs at Washington and the Governor General of the Philippines contained messages to and from the Philippine Nat Bank and were carried at the Government rate. The question was whether the Philippine Nat. Bank occupied such a relation to the Government as to be entitled to have its messages sent as departmental messages.

The Philippine Government owned nearly the entire capital stock of the bank, which was created by a special act of the Philippine legislature for the purpose of taking over the Philippine Government Bank. The approval of the Governor General and of the presiding officers of the Philippine legislature is necessary for various corporate acts of the Bank, which is the official governmental depositary and is peculiarly subject to the direct control of the Governor General and the Philippine Senate.

Notwithstanding those intimate relations, it was held that the Bank was neither a department nor an agent of the United States .

4. In response to the suggestion that the bonds were executed under the borrowing power

because the Federal Land Banks were chartered by Congress, it is sufficient to say:

(*a*) The argument is an example of reasoning in a circle because in one breath the validity of the bonds is based on the borrowing power *because* executed by a Federal corporation, and, next, the very *existence* of the Federal corporation is defended as a *means* for executing the borrowing power.

(*b*) Congress has chartered several railroads, but no one has ever suggested that their bonds were valid under the borrowing power of the Constitution.

SECOND POINT.

Congress could not acquire the power (1) to create a series of corporations (Federal Land Banks and Joint Stock Land Banks) to engage in the business of lending private capital on farm mortgages, and (2) to exempt them from all State control, by the mere expedient of calling such corporations "Banks" and endowing them with the possibility of acting as depositaries of public money or financial agents.

In the case of the Joint Stock Banks, there is not even the flimsy pretense (which nominally exists in the case of the Federal Land Banks) that the power of appropriation is in-

volved or that the money raised by the mortgages is to be used for agricultural development. There is *no limit or restriction whatever* as to the *purposes* for which the money loaned may be used, as Joint Stock Banks are expressly exempted from the limitations imposed upon Federal Land Banks in that respect. (Cf. § 16; §12, Clause Fourth (*a*), (*b*), (*c*), (*d*).)*

For example, an anarchist owning unimproved, vacant, uncultivated farm lands can mortgage them to a Joint Stock Bank in order to use the money to advance the cause of Bolshevism; and, yet, the mortgage, the income therefrom, the collateral trust bond (Farm Loan Bond) issued against it and secured thereby, and the income therefrom, are *wholly exempt* from all State and Federal taxation.

The Government's argument is this:

Congress has the power to create depositaries of public money and financial agents of the Gov-

*Even the co-operative and collective plan of borrowing by the farmers; the joint and several liability of the banks, and the full degree of Federal supervision, which exist in the case of the Federal Land Banks and were the strongest arguments advanced in Congress in favor of the Act, were specifically *dispensed with* in the case of the Joint Stock Banks, because some farmers might object to a co-operative undertaking with their neighbors, or to the publicity and scrutiny thereby entailed. (Senate Rep. 144, p. 11; House Rep. 630, p. 910; 1st Annual Rep. of Federal Farm Loan Board, p. 22.)

ernment (*McCulloch* v. *Maryland,* 4 Wheat. 316; *Farmers &c Nat. Bk.* v. *Dearing,* 91 U. S. 29); and, from that premise the Government deduces the conclusion that because Congress (§ 6) authorized the Secretary of the Treasury to designate the Federal Land Banks and the Joint Stock Banks depositaries and financial agents, it was also entitled (1) to confer upon them the right to conduct the private business of lending on farm mortgages and (2) to exempt them from all State taxation. (*Osborn* v. *Bank,* 9 Wheat. 738, 864; *First National Bank* v. *Union Trust Co.,* 244 U. S. 416.) This amounts to the assertion, that Congress acquires the right to create a corporation, *to endow it with the power to do things which Congress has no right to regulate or control, and to exempt it from the power of the States,* by the simple expedient of declaring that the Government may, if it chooses, use a corporation as its agent in some particular (but without ever so using it).

Such a claim of Congressional authority has never before been advanced in this Court and must be promptly rejected.

If the mere *possibility of performance* of incidental Governmental duties authorizes Con-

gress to create corporations (*a*) to exercise powers not conferred on Congress by the Constitution, and (*b*) to exempt such corporations' private operations and assets from all taxation, then cannot Congress make all State Banks potential depositaries, declare libraries the custodians of copyrighted books, department stores and drug stores agencies for the sale of War Savings Stamps, insurance companies agencies for the compilation of census statistics, and thus exempt from State taxation, everything connected with their private business profits?

Instead of creating, or using an existing corporation as an instrumentality, Congress might utilize a State official or State institution for some Federal purpose. But that does not authorize Congress to lessen the State authority over such agency. (*U. S.* v. *Jones,* 109 U. S. 513, 519; *Mulcrevy* v. *San Francisco,* 231 U. S. 669, 673; *Holmgren* v. *U. S.,* 217 U. S. 509, 517.)

Indeed, as a means for carrying into effect its express powers, Congress has already authorized purely *intra*-state steam railroads to carry Government troops, supplies, mails, etc.; has declared railroads, canals, etc., to be post roads; and has authorized State Banks and Trust Companies to act as both "depositaries" and "fiscal

agents" of the Government in connection with the sale of Government bonds, certificates of indebtedness and War Savings Certificates. (See Second, Third and Fourth Liberty Bond Acts.)

Because State Banks and Trust Companies have been thus designated as depositaries and fiscal agents of the Government, and have in fact served as such Government instrumentalities, can it be contended that Congress has the power to declare that all mortgages executed *to* such State institutions are Federal instrumentalities and exempt from State taxation; and that all collateral trust bonds issued *by* such State institutions (as vast numbers of them constantly do issue), are instrumentalities of the Federal Government and likewise exempt from State taxation? Or can Congress declare that all the employees of such institutions, even in the performance of its private business, shall be exempt from the State's Minimum Wage or Hours of Labor laws?

It must be remembered that we are considering a question of *constitutional power*. If, as the Government now contends, Congress *has the power* to create a possible depositary and fiscal agent and can declare its private business

and all obligations executed to or issued by it, exempt from taxation, certainly the principle supporting such action, also authorizes Congress to designate individuals, firms and corporations as depositaries and fiscal agents, and thereby exempt their private business from State taxation. There is no pretense that the private business of the Farm Loan Banks is (as in the *McCulloch* and *Osborn* cases), essential to the performance of governmental duties.

If, then, these Joint Stock Banks and Federal Land Banks are to be sustained on the principle of possibly acting as depositaries or financial agents, it would be within the control of Congress *to exempt from State taxation the shares of stock in State corporations* used as Federal depositaries or fiscal agents, and also the property and business of *firms* and *individuals* similarly so employed.

For some years past State banks, trust companies, firms and private bankers have been the *means* by which Congress has collected income taxes at the source, thereby acting as important Federal instrumentalities in the execution of the express power of taxation. The income tax law requires all firms or corporations engaged in the business of collecting foreign payments

of interest or dividends to be licensed by the Government and to withhold the income tax at the source. The fact that these persons were engaged in that foreign business made them peculiarly valuable as collecting instrumentalities of the Government's taxes. Could Congress have declared that mortgages executed by persons to such Banks, Trust Companies, firms or private banking houses, were exempt from taxation and that all bonds issued by such institutions or persons were similarly exempt from taxation in the hands of third parties who purchased them as an investment?

The supporters of the Act claim that because Congress has the implied power to establish national banks which have large sums of money on deposit, deal in money, transfer funds from place to place by operations in exchange, furnish a basis for a sound currency, and *inter alia* deal with ordinary *commercial* credits, *consequently* Congress must also have the right to establish banks to deal with *agricultural* credit, but which possess *none* of the attributes of commercial banks. The authors of those arguments have failed to appreciate the constitutional ground upon which Congress is authorized to establish what they term a bank of commercial credit.

It must always be borne in mind that neither the Federal Land Banks nor the Joint Stock Banks can lend any assistance towards furnishing or regulating a sound currency; nor assist the Government in times of stress by furnishing liquid capital (from depositors' funds) to meet sudden governmental needs,* nor indeed to perform any of the functions which render the National Banks so essential to governmental operations.

On the contrary, by the very nature of their long term loans, in times of financial stress or governmental need, the Farm Loan Banks have to be helped *by* the Government. To-day, the Government has had to advance $175,000,000 to enable the Banks to operate; and at a time when the Government was having to pay 6 per cent for its own borrowings!

When the grounds upon which the power of Congress to establish the old Bank of the United States and the present National Banking System, are critically examined, it will be seen that the power to create such banks is rested upon circumstances wholly absent in the case of both the Federal Land Banks and the Joint Stock Banks.

*For the simple reason that their assets are required to be tied up in long term mortgages and must be kept closely invested in that way in order to produce the necessary funds to redeem the Farm Loan Bonds at maturity.

Both the First and the Second Banks of the United States and the present National Banks were created immediately after, or during, a great war, for the express purpose of affording the *means* for the *execution* of important *express* powers vested in Congress.

I. *The decisions in McCulloch* v. *Maryland, Osborn* v. *Bank of U. S. and 1st Nat. Bank* v. *Union Trust Co., do not afford any basis for the creation of either the Federal Land Banks or the Joint Stock Banks.*

1. The Farm Loan Banks are expressly *prohibited* from doing everything which was held to be the constitutional basis for the incorporation of the First and Second Banks of the United States and of the National Banking System; while, on the other hand, the only thing they are *permitted* to do (*i. e.*, lend on real estate mortgages) was expressly *prohibited* to both the Banks of the United States, and, until 1913, to all National Banks.

Therefore, the creation of the Farm Loan Banks (with but one function to perform and denied all others) cannot be based upon the arguments and considerations which justified the creation of the old Bank of the United States

and the National Banks who were *prohibited* that *one* function and *given all the others.*

2. The authorities cited in the margin* show that the First and Second Banks of the United States were in fact *the means actually used* by the Government to carry on its fiscal operations; to obtain loans in anticipation of revenues; to facilitate the payment of Federal taxes; to furnish a uniform and orderly currency on a sound specie basis; to collect, safeguard and transport money, and to transfer public funds from place to place (without cost to the Government or loss to it on account of the difference in exchange) as the exigencies of the Nation required. None of those functions can be performed by the Farm Loan Banks.

The appropriateness, if not the absolute necessity for the Second Bank of the United States

*Bank of the United States. *McCulloch* v. *Maryland*, 4 Wheat. 316, 407-409; *Osborn* v. *Bank*, 9 Wheat. 738, 861-864; Beveridge's Life of John Marshall, Vol. 4, pp. 171, 176-195; Holdsworth & Dewey's "First and Second Banks of the United States"; McMaster's History of the People of the United States, Vol. 2, p. 29; Id. Vol. 4, p. 280 *et seq.*: especially pages 300-318; Hamilton's Report on a National Bank.

National Banking System. Lincoln's Veto Message of June 23, 1862 (6 Messages and Papers of the Presidents, pp. 87, 88); Lincoln's 2nd Annual Message, Dec. 1, 1862 (Id., pp. 126, 129-130); Rhodes' History of the United States, Vol. 4, pp. 237-239; Noyes' "History of the National Banking Currency," p. 41; Davis' "The Origin of the National Banking System," pp. 79, 80, 89, 106, 109; *Veazie Bank* v. *Fenno*, 8 Wall. 533, 536-539, 548.

as a national agency, arose from the fact that there was an utter chaos in banking; the Government had been deprived of its almost indispensable fiscal agent (the First Bank of the United States); the Government could not negotiate loans; taxes were collected with great difficulty, loss, and delay; the Treasury was so near bankrupt that the Department of State did not have sufficient money to pay its stationery bill; in desperation, the Treasury exchanged 6 per cent Government bonds for the notes of State Banks, thereby losing $5,000,000 from worthless bank bills. The local State Banks became the sole depositaries for Government funds, the worthless currency of such banks flooded the country, interfering with commerce and all business, while the suspension of specie payments by the State Banks rendered a uniform national currency indispensable.

The National Banking System was established, and was in fact used by the Government, in order to furnish a sound and uniform currency and to prevent injurious fluctuations thereof; to facilitate the payment of troops, to receive subscriptions for, to distribute among the public, and to provide a market for, Government bonds which were used as the basis of the notes issued

by the banks; to furnish depositaries at convenient places throughout the country for public funds, at a time when every collector of Federal taxes was afraid to deposit the money in State Banks, was responsible for the funds collected and yet was compelled to hold it in his personal possession, subject to the danger of fire and accident, as the Government did not even furnish an office safe for that purpose.*

The Farm Loan Banks do not assist the Government to borrow money. To say they do, or can, is simply to ignore the plainest facts. *Every dollar of their deposits* (in the unlikely event of their stockholders making any deposits) must be invested in Farm Loan Bonds or farm mortgages. (§ 11.) They are not even permitted to invest their deposits in United States bonds.

Theoretically, the Farm Loan Banks have the power to invest the moneys received from the interest and amortization payments by the farmers, in U. S. bonds; but practically they would never do so, for such act would be at a loss and would operate to stop the system from functioning.

*For authorities, see footnote at p. 63, *supra*.

By what authority can Congress create a bank?

In *McCulloch* v. *Maryland,* 4 Wheat., 316, the implied power of Congress to incorporate a bank was based upon the ground that in order to carry out the *express* powers to collect taxes, to borrow money, to regulate commerce, to carry on war and to raise and support armies and navies, it was absolutely necessary for the Government to conduct fiscal operations; that a bank was a convenient, useful and essential instrument in the prosecution of fiscal operations and therefore Congress was authoried to create the bank and use it for those purposes.

In *Osborn* v. *Bank,* 9 Wheat., 738, the Court re-examined the basis of the *McCulloch* decision and reaffirmed it, holding (as the marginal authorities on p. 63, *supra,* demonstrate) that the Bank of the United States was not created for private purposes, but was created for National purposes only; that the operations of the Bank gave value to the currency in which all governmental transactions were conducted and acted as a machine for the money transactions of the Government; that "as a machine for the fiscal operations of the Government" it was *essential* for the Bank to engage in *general bank-*

ing business, as otherwise, the Bank could not perform these services for the Government which were exacted from it, and for which it was created.

Considering that the Bank of the United States was chartered by Congress for the *express purpose* of performing, and that it *did* perform, the indispensable governmental services necessary to carry into effect important, express and exclusive powers of Congress, how can it be contended that *those* decisions afford *any warrant* for Congress to create the Farm Loan Banks?

The basis of the *McCulloch* and *Osborn* cases was not that the banks were mere passive depositaries or undefined financial agents, but was this: *By virtue of engaging in general banking,* they were enabled to perform a great many active and indispensable services *essential* to be performed in order to carry on Government business.

In the case at bar, the Farm Loan Banks are expressly *prohibited* from doing those things which authorized the creation of the Bank of the United States. Their private business cannot in any conceivable manner serve as a means for carrying any Congressional powers into execu-

tion; nor do they in fact perform any duties as depositaries or financial agents.*

If it should be suggested that the mere potential power to act as depositary and fiscal agent, *ipso facto* authorizes these institutions to carry on a purely private business, exempted from State control and taxation, then *a fortiori* there would be exempted from State control and taxation the numberless State Banks and Trust Companies which, by the Second, Third and Fourth Liberty Bond Acts were not only *designated,* but in fact *acted* as "depositaries" and "fiscal agents" of the United States "in connection with the operations of selling and delivering any bonds, certificates of indebtedness or War Savings Certificates of the United States."

Certainly institutions which *in fact* act as depositaries and fiscal agents of the United States pursuant to express statutory authority, would be more clearly exempted from State taxation than a Farm Loan Bank which has a mere possibility in that direction, but which has never been vitalized by designation from the Secretary of the Treasury.

*The so-called "seed loan" services of three Federal Land Banks were not banking services at all. They could have been performed by any private individual.

Since the passage of the Farm Loan Act, the United States has gone through the greatest war in history; its fiscal operations have exceeded many fold its previous combined operations since the beginning of the Government; it has called into service, as a means for carrying out its fiscal powers, innumerable agencies, individual and corporate, none of which were ever deemed to be thereby exempted from State taxation or control; and yet it is now solemnly argued that the Farm Loan Banks, engaged in a wholly private business, are exempted, although they have never as yet been designated to act as depositaries.

3. On the other hand, the *McCulloch, Osborn* and *Union Trust Co.* cases are controlling authorities *against* the validity of the Farm Loan Banks.

In *McCulloch* v. *Maryland,* after holding that Congress could charter that particular bank because it was an appropriate means, plainly adapted to a legitimate end within the scope of the express powers granted by the Constitution, the CHIEF JUSTICE emphasized the fact that in order to justify the incorporation of a Bank it must be an *appropriate* measure to carry out *express* powers.

The Court said (p. 423):

> "Should Congress, *under the pretext of executing its powers,* pass laws for the accomplishment of objects *not* entrusted to the Government, it would become the painful duty of this tribunal should a case requiring such a decision come before it, to say that such an act was not the law of the land. But where the law is not prohibited, and is *really calculated* to effect any of the objects entrusted to the Government, to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground."

Congress here undertook the accomplishment of an object not entrusted to it, namely, to provide a farm loan mortgage system throughout the States; and attempted to save its constitutionality by the pretext of declaring that the Secretary of the Treasury might designate the corporation a depositary and financial agent. If the present state of case does not fall directly within the above language of CHIEF JUSTICE MARSHALL, what case could fall within it?

Again, in *Osborn* v. *Bank,* the great Chief Justice, while sustaining the validity of the bank's creation, notwithstanding the fact that it engaged in private business while carrying out its governmental functions, emphasied the fact that the bank was created *primarily for national pur-*

poses and that it was only necessary to allow it to do private business *in order to effectively carry out the national purposes for which it was particularly created.* In other words, in order to be an effective *means* for performing the fiscal operations of the Government, it was desirable that the Bank should be engaged in the private banking business as well; because, for example, if the Bank collected public revenues and locked them up as in a subtreasury, the country would be unduly drained of currency with many resultant governmental disadvantages. (See, also, Lincoln's speech in reply to Douglas, December, 1839: Vol. 1, pp. 197-198 of Lincoln's Writings, Constitutional Edition.)

Continuing, the CHIEF JUSTICE said that if the Bank had been created "having private trade and private profit for its great end and principal object" it would have been taxable by the State—but that the Bank of the United States was *not* chartered principally for private profit, saying (p. 859):

> "This mere private corporation, engaged in its own business, with its own views, would certainly be subject to the taxing power of the State, as any individual would be; and the *casual circumstance* of its being employed by the Government in the transaction of its fiscal af-

> fairs would no more exempt its private business from the operation of that power than it would exempt the private business of any individual employed in the same manner."

Does not that language precisely describe the Farm Loan Banks, except that they are not even *casually* employed by the Government as depositaries, never having been designated by the Treasury Department for that service, and may never be?

Emphasizing that Congress could not create a corporation to carry on a private business, the Court declared that the Bank of the United States (as the history of the times demonstrates, p. 63, *supra*) was not chartered in order that private individuals might carry on the banking business, but that it was created especially as a means for *executing the powers vested in Congress,* saying (p. 860):

> "The Bank is not considered as a private corporation, whose principal object is individual trade and individual profit; but as a public corporation created for public and national purposes. That the mere business of banking is, in its own nature, a private business, and may be carried on by individuals or companies having no political connection with the Government, is admitted; but the Bank is not such an individual or company. It was not created for its own sake, or for private purposes. *It has never*

been supposed that Congress could create such a corporation. The whole opinion of the court in the case of *M'Culloch* v. *The State of Maryland* is founded on, and sustained by the idea that the Bank is an instrument which is 'necessary and proper for carrying into effect the powers vested in the Government of the United States.' It is not an instrument which the Government found ready made, and has supposed to be adapted to its purposes; but one which was *created,* in the form in which it now appears, for *national purposes only.*"

Will anyone have the hardihood to contend that the Farm Loan Banks were only created in order to enable Congress to carry out national purposes vested in it?

Referring to the Bank's power to transact private, as well as public, business, the Court said (p. 861):

"Why is it that Congress can incorporate or create a Bank? This question was answered in the case of *M'Culloch* v. *The State of Maryland.* It is an instrument which is 'necessary and proper' for carrying on the fiscal operations of government. *Can this instrument,* on any rational calculation, *effect its object unless it be endowed with that faculty of lending and dealing in money* which is conferred by its charter? If it can, if it be as competent to the purposes of government without as with this faculty, there will be much difficulty in sustaining that essential part of the charter. If it cannot, then

> this faculty is necessary to the legitimate operations of government, and was constitutionally and rightfully engrafted on the institution."

Would not Farm Loan Banks be as competent to act as depositaries and financial agents of the Government, *without* the added faculties of lending on farm mortgages, as *with* it?

The Court next decided that, as a matter of fact, it was necessary for the Bank, in performing its functions "as a machine for the money transactions of the Government" to "be endowed with that faculty of lending and dealing in money which is conferred by its charter" and in short, that the private trade of lending and dealing in money, was *necessary* to enable the Bank to perform the very services for which it was created.

The Farm Loan Act expressly prohibited the Joint Stock Banks from receiving deposits or transacting any banking or other business except that of lending on farm mortgages; and prohibited the Federal Land Banks from receiving any deposits except from its stockholders who are also borrowers.

For what express national purposes were these Farm Loan Banks created? In what way is such national purpose dependent for its proper execution, upon the lending of A's money to B at low

rates, and exempting its transactions from State taxation? What fiscal operations of the Government are aided by the private business of farm mortgages? In what way is that branch of the business necessary to enable the Farm Loan Banks to perform any national purpose?

The fallacy in the argument for the Joint Stock Banks is that it erroneously assumes that Congress had the power to create, and did create national banks, in order to provide credit facilities to industry and commerce and from which assumption the conclusion is deduced that what Congress could do for men in commercial business it can likewise do for men in the farming business. It needs no extended argument to demonstrate that Congress has no power to create banks to aid business credits. Its sole power is to create a bank which because it does such business can thereby more efficiently serve as a means of executing those great express powers of Congress, to collect taxes, provide money, etc., *whereas* a bank for farm loans cannot aid Congress in its powers at all; and hence cannot be created.

Remembering that the Farm Loan Banks are prohibited from doing any banking business and are confined to the business of farm mortgage

lending, let us examine the *Osborn* and *Union Trust Co.* cases to see what bearing they have on the subject.

(*a*) In the *Osborn* case, it was held that the business of general banking conducted for private profit, was, of and in itself, *essential* to be carried on, in order to furnish the necessary facilities that the corporation might in turn act "as a machine for the money transactions of the Government"; and for that reason alone, it was held that Congress had the right to endow the Bank with ordinary banking functions as a necessary means for executing conceded powers of Congress. But certainly it cannot be contended that the farm mortgage business bears any relation whatever to the execution by the Farm Loan Banks of any express power of Congress, especially as they have never been designated to act.

(*b*) Since the creation of the National Banking System, almost every State in the Union has passed laws to permit a corporation to exercise both commercial banking powers and *fiduciary* powers.

In 1913, the Federal Reserve Act, authorized National Banks also to exercise fiduciary powers.

In *First National Bank* v. *Union Trust Co.*, 244 U. S., 416, it was held that Congress had the constitutional power to endow national banks with the capacity to transact private fiduciary business. The decision was based upon the ground that while ordinarily it might be beyond the power of Congress to enter the fiduciary field, yet, as State banks had very generally taken on such powers and had thereby obtained an advantage over National Banks, it was competent for Congress to give them these additional powers in order to make the operation of the National Banks successful.

The Court said the ruling in *Osborn* v. *Bank* was (p. 420):

> "that although a particular character of business might not be when isolatedly considered within the implied power of Congress,"

yet

> "if such business was appropriate or relevant to the banking business the implied power was to be tested by the right to create the bank and the authority to attach to it that which was relevant in the judgment of Congress to make the business of the bank successful."

That is exactly our explanation of the *Osborn* case (pp. 66, 70-74, 76, *supra*), namely, that in order to enable the Bank successfully to perform its functions as a machine for the fiscal opera-

tions of the Government, Congress could authorize it to conduct such private banking business as tended to make it a more effective Government agent.

The Court criticised the lower court because it had considered the power of Congress to enter the fiduciary field as an independent question and had not considered it as a necessary incident to the performance of the Bank's governmental functions, saying (p. 424) that the lower court

> "instead of testing the existence of the implied power to grant the particular functions in question by considering the bank as created by Congress as an entity with all the functions and attributes conferred upon it, rested the determination as to such power upon a separation of the particular functions from the other attributes and functions of the bank and ascertained the existence of the implied authority to confer them by considering them as segregated, that is, by disregarding their relation to the bank as component parts of its operations—a doctrine, which, as we have seen, was in the most express terms held to be unsound in both of the cases [*McCulloch* v. *Maryland* and *Osborn* v. *Bank*]."

Again the Court said:

> "What those cases [*McCulloch* and *Osborn*] established was that although a business was of a private nature and subject to State regulation, if it was of such a character as to cause it to be incidental to the successful discharge, by

a bank chartered by Congress, of its public functions, it was competent for Congress to give the bank the power to exercise such private business in co-operation with or as a part of its public authority. * * * From this it must also follow that even although a business be of such a character that it is not inherently considered susceptible of being included by Congress in the powers conferred on national banks, that rule would cease to apply if by state law state banking corporations, trust companies, or others which by reason of their business are rivals or *quasi*-rivals of national banks, are permitted to carry on such business."

Farm Loan Banks are not only *not* national banks, but they are *prohibited* from doing everything that national banks are authorized to do.

There is no magic about the name "Bank." Can Congress authorize the great life insurance companies and department stores to act as depositaries and purchasing agents and thereby exempt them from all State control—for if the *taxing* power can be prohibited, all others can also be denied to the States.

Can it be successfully contended that because Congress uses National Banks as a means for the execution of conceded constitutional powers and may confer upon them private powers

deemed necessary for the successful performance of their public duties, it is also competent for Congress primarily to confer such private powers upon a corporation which performs *no* public functions? Or, putting it in a slightly different way, can Congress assume the power to authorize corporations to enter upon fields of activity reserved to the States, by the simple declaration that such corporation *may,* at some future time, be used, not as National Banks are used, but as an incidental and unimportant governmental agency wholly unrelated to the private business sought to be authorized? If Congress has that power, then this government ceases to be one of enumerated powers and Congress can enter upon any prohibited field of endeavor.

(*c*) As most State Banks are authorized to lend upon real estate mortgages, it was, of course, a mere matter of expediency whether Congress should authorize National Banks to enter that field; but that is because the National Banks are actually employed as the *means* of executing the express powers of Congress; and the addition of certain private powers falls clearly within the doctrine of the

Osborn and *Union Trust Co.* cases. But it is a very different thing for Congress to enter primarily upon a *prohibited* field and to endeavor to justify it by declaring that the corporation through which Congress operates shall have a possible power to act as a Government agent.

If the doctrine contended for by the Government be sound, is there any limit to the fields of private endeavor in which Congress may enter?

THIRD POINT.

The farm mortgages executed to the Federal Land Banks and to the Joint Stock Land Banks, and the Farm Loan Bonds issued by them respectively, and held by the general investing public, are subject to State taxation.

The power to tax exists concurrently in both the State and Federal Governments; and is equally indispensable to the existence of each (*McCulloch* v. *Maryland,* 4 Wheat. 316, 425; *Lane Co.* v. *Oregon,* 7 Wall. 71, 76, 77).

The Constitution does not expressly prohibit the States from taxing the instrumentalities of the Federal Government, and contains no restriction whatever on the power of either to tax, except a few express prohibitions not here ma-

terial**; nor does it grant any power to Congress to exempt property from State taxation or otherwise to control State action as to taxes.

Nevertheless, the Farm Loan Act attempts to *deprive* the States of the power to tax a species of property which has always been taxed and is one of the principal sources of revenue to many States, counties and cities.

Where does Congress obtain such a power? Certainly there is no *express* grant. Is there an implied power to exempt property from State taxation? If so, to what express power is it incidental?

The answer to these questions is that there *are* certain *implied* limitations on the taxing power of both the State and Federal Governments arising out of the very nature of our dual system of Government (*McCulloch* v. *Maryland,* 4 Wheat. 316, 425, 426; *The Collector* v. *Day,* 11 Wall. 113, 123; *U. S.* v. *Railroad Co.,* 17 Wall. 322, 327; *Railroad Co.* v. *Peniston,* 18

Savings Society v. *Multnomah Co.,* 169 U. S. 421, 426, 427, and cases there cited; *Kirtland* v. *Hotchkiss,* 100 U. S. 491, 498; *New Orleans* v. *Stempel,* 175 U. S. 309, 322; *Bristol* v. *Washington Co.,* 177 U. S. 133; *De Ganay* v. *Lederer,* 250 U. S. 376, 381, 382, and cases there cited.

**On Congress:* No tax on exports; direct taxes must be apportioned; indirect taxes must be uniform; *On the States:* No tax on exports; no tax on imports, except for inspection purposes; no duty on tonnage.

Wall. 5, 30; *Dobbins* v. *Commissioners,* 16 Pet. 435, 447; *Van Brocklin* v. *Tennessee,* 117 U. S. 151, 157 *et seq.*); that any restriction upon the State's power to tax arises from the operation of the Constitution itself; and that Congress cannot, by any declaration of exemption, create one that would not have equally existed without such declaration. In other words, any attempt by Congress to exempt property from State taxation, if valid, is merely declaratory of what the exemption would have been anyway, without such declaration.

This leads us to consider the nature of the implied limitations on the taxing power, which have been consistently applied by this Court for just 100 years.

The doctrine was first announced by Chief Justice MARSHALL in *McCulloch* v. *Maryland;* and all subsequent cases have been applications of that principle, which has never been departed from, and of which the statutes are but declaratory.

Shortly after the Second Bank of the United States was incorporated (for the express purpose of furnishing a means by which the fiscal operations of the Government might be con-

ducted), numerous States endeavored to exterminate the Bank by the weapon of State taxation. At least eight States (Indiana, Maryland, Tennessee, Georgia, Illinois, North Carolina, Kentucky and Ohio) passed laws which either directly prohibited the Bank from doing business within their limits, or imposed ruinous taxes upon it, or its branches, for the privilege of transacting business within the State, the taxes running as high as $50,000 or $60,000 a year upon each branch in Tennessee, Kentucky and Ohio (Beveridge's Marshall, Vol. IV, p. 207).

A Maryland Statute prohibited any Bank (other than Maryland State Banks) from issuing any notes except of certain specified denominations, which must be upon stamped paper, the amount of the stamps varying from $0.10 to $20, obtainable only from the State, in lieu of which a tax of $15,000 a year was imposed.

The validity of this statute as applied to the Bank of the United States, arose in *McCulloch* v. *Maryland*. The Court held that a State could not tax the *means* employed by Congress to execute its powers; and this conclusion was based upon the ground that, as, the power to tax involved the power to destroy, the States might

so heavily tax the means or instruments employed by the Government in the execution of its national powers as to prevent the Government from functioning. Chief Justice MARSHALL stated his conclusions in the following language, which defines the implied limitation upon the taxing power of the States (4 Wheat. 436):

> "The Court has bestowed on this subject its most deliberate consideration. The result is a conviction that the States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government. This is, we think, the unavoidable consequence of that supremacy which the constitution has declared.
>
> We are unanimously of opinion that the law passed by the Legislature of Maryland, imposing a tax on the Bank of the United States, is unconstitutional and void.
>
> This opinion does not deprive the States of any resources which they originally possessed. It does not extend to a *tax paid by the real property* of the bank, in common with the other real property within the state, nor to a *tax imposed on the interest which the citizens of Maryland may hold in this institution*, in common with other property of the same description throughout the State.
>
> But this is a tax on the *operations* of the bank, and is, consequently, a tax on the opera-

> tion of an instrument employed by the government of the Union to carry its powers into execution. Such a tax must be unconstitutional."

In *Osborn* v. *Bank* (involving the validity of an Ohio law passed "for the avowed purpose of expelling the Bank from the State" and imposing an annual tax of $100,000 as a privilege for doing business), it was held that the private, as well as the public, operations of the Bank were *essential* to the performance of its services to the Government, and that a State could not tax it for the privilege of doing business.

In response to the contention of counsel (9 Wheat. 777, 794, 795) that in order for the Bank to be exempt from State taxation, Congress must insert a specific clause of exemption in the charter, the Court pointed out in the following language that the exemption from State taxation did not rest upon the exercise by Congress of any power to declare an exemption, but was incidental to the creation of the instrumentality itself and that the judicial power was the instrument to see that the necessary security of governmental instrumentalies from State Interference was obtained:

> "It is contended that, admitting Congress to possess the power, this *exemption* ought to have

been *expressly asserted* in the act of incorporation; and, not being expressed, ought not to be implied by the court.

It is not unusual for a legislative act to involve consequences which are not expressed. An officer, for example, is ordered to arrest an individual. It is not necessary, nor is it usual, to say that he shall not be punished for obeying this order. His security is implied in the order itself. It is no unusual thing for an act of Congress to imply, without expressing, this very exemption from State control which is said to be so objectionable in this instance. The collectors of the revenue, the carriers of the mail, the mint establishment, and all those institutions which are public in their nature, are examples in point. It has never been doubted that all who are employed in them are protected while in the line of duty; and yet this protection is not expressed in any act of Congress. It is incidental to, and is implied in, the several acts by which these institutions are created, and is secured to the individuals employed in them by the judicial power alone; that is, the judicial power is the instrument employed by the government in administrating this security.

That department has no will, in any case. If the sound construction of the act be that it exempts the trade of the Bank, as being essential to the character of a machine necessary to the fiscal operations of the government, from the control of the States, Courts are as much bound to give it that construction as if the exemption had been established in express terms."

This language has but one meaning and that is that when it comes to the exemption from State taxation of instrumentalities of the Federal Government in order that they may be preserved from destruction, it is at last the judicial power which must determine whether or not the exemption exists by virtue of the nature of the instrumentality.

The authorities show

First. That many instrumentalities of the Federal Government have been subjected to the power of State taxation, because, in the opinion of this Court, such taxation did not interfere with their operations for the Government.

Second. That such exemption exists not by virtue of any *declaration* by Congress that the exemption should exist, but under the Constitution *ex proprio vigore.*

Third. That in the case of the National Banks, Congress has expressly provided (R. S. 5219) for the taxation of the shares of stock and the bank's real estate exactly as MARSHALL held in *McCulloch* v. *Maryland* they could be taxed.

A short review of the cases will show they are all consistent with these principles.

I. *Means and instrumentalities of the State and Federal Governments respectively exempted from taxation by the other.*

(*a*) The States cannot tax United States Government bonds or other direct obligations of the United States (*Weston* v. *City of Charleston*, 2 Pet. 449; *Bank* v. *Supervisors*, 7 Wall. 26); nor bonds issued by municipalities in the Territories established by Congress for the Government of the people before their admission as States (*Farmers' Bank* v. *Minn.*, 232 U. S. 516) or by the District of Columbia (*Grether* v. *Wright*, 75 F. R. 742, 753, *et seq.*); nor land owned by the United States, either when purchased in pursuance of a governmental function, or acquired as a part of its territorial domain by a treaty or otherwise (*Van Brocklin* v. *Tenn.*, 117 U. S. 151); nor the receipts from coal mines owned by the Indians but operated by private parties under a lease from the Government in pursuance of the Government's treaty obligations to apply the revenues from the mines to the education of Indian children (*Choctaw & Gulf* v. *Harrison*, 235 U. S. 292); nor the salary of a Federal official (*Dobbins* v. *Commissioners*, 16 Pet. 435); nor the necessary operation of a means adopted by the United

States to execute its express powers (*McCulloch* v. *Maryland*, 4 Wheat. 316; *Williams* v. *Talladega*, 226 U. S. 404, 418, 419); nor the franchise of a corporation created by Congress. (*California* v. *Pacific R. R. Co.*, 127 U. S. 1); nor the tangible or intangible property (except real estate) of corporations organized primarily as instrumentalities of the Government. (*Owensboro National Bank* v. *Owensboro*, 173 U. S. 664.)

(*b*) Reciprocally, Congress cannot tax the bonds or obligations of a State or its municipal subdivisions (*Pollock* v. *Farmers Loan & Trust Co.*, 157 U. S. 429, 584; *Mercantile Bank* v. *New York*, 121 U. S. 138, 162); or the salary of a State official (*Collector* v. *Day*, 11 Wall. 113, 124), or municipal revenues (*U. S.* v. *Railroad Co.*, 17 Wall. 322).

The principle underlying all of the foregoing cases, is that neither the State nor Federal Government can tax the property or operations of any instrumentality used by the other as a means of executing its powers, subject to the qualification (*a*) that such agent's real estate can be taxed (in common with other realty) and (*b*) that its other property can also be taxed in those cases where the agency is engaged in pri-

vate business, which private business is not essential to the performance of its governmental duties.

II. *The States may tax the property and operations of persons and corporations engaged in private business, although also employed by the Federal Government in the transaction of its business.*

Accordingly, it has been held that a State can tax checks drawn by the United States in the payment of its interest obligations, notwithstanding an attempted Congressional exemption of United States obligations from State taxation. (*Hibernia Savings Society* v. *San Francisco*, 200 U. S. 310); the personalty, credits, money, etc., of a railroad company chartered by Congress, financially asisted by it, and engaged in performing Federal services (*Thomson* v. *Railrood*, 9 Wall. 579; *Railroad Co.* v. *Peniston*, 18 Wall. 5, 30-35; *Union Pacific* v. *Lincoln County*, 1 Dill. 314); while it is a matter of common knowledge that the States can tax and do tax many species of property which are being used by agents of the United States as the means of executing powers of the Government, such as telegraph lines, dredges, manufacturing plants

(*Gromer* v. *Standard Dredging Co.*, 224 U. S. 362; *Baltimore Shipbuilding Co.* v. *Baltimore*, 195 U. S. 375, 382).

The reason why the States can tax the property and business of railroads, telegraph lines, etc., although they may have been chartered by Congress and used in part as governmental instrumentalities, and yet cannot similarly tax National Banks, lies in the following distinction between the two instrumentalities.

The railroads and telegraph lines could, in fact, perform all the services for the Federal Government just as well *without* the addition of private business, as they can with it (except as a money making proposition); and hence in accordance with the express language of *Osborn* v. *Bank** the property and private operations of the companies are generally taxable by the State.

On the other hand, the banks, as pointed out in *McCulloch* v. *Maryland* and in the *Osborn*

*The Court said (9 Wheat. 861) that there would be much difficulty in sustaining the private features of the Bank's charter "if it be as competent to the purposes of Government without as with this faculty" of transacting private business. But the Court held that the transaction of private business was necessary to the legitimate operations of the Government—not because it was more profitable to the Bank, but because the essential functions of the Government work could not be carried out so well, except in conjunction with private banking.

case, could *only* satisfactorily perform their Governmental duties by being endowed with the right to transact private business; as *private* banking business was the *very thing* which was needed to enable them to be an efficient machine for carrying out the money operations of the Government.

A Farm Loan Bank acting as a depositary, could, like the railroads, perform such a function just as satisfactorily to the Government without, as with, the addition of the private farm mortgage business. That is an additional reason why they fall as depositaries into the category of the railroads and not of that of the National Banks.

The mere possibility that at some future time the United States may elect to designate a Farm Loan Bank as a depositary and thereafter may further elect actually to use it as such, while in the meantime the corporation is engaged solely in private business for private gain, certainly does not constitute the corporation such an instrumentality of the Federal Government as to exempt it from State taxation.

In *Baltimore Ship Building Co.* v. *Baltimore*, 193 U. S. 375, 382, an old Government fort (of course not taxable) was conveyed to a ship-

building company upon condition that it would construct a dry dock thereon, that the United States should have the right to use it forever free of charge, and that if its use as a dry dock was ever abandoned, the property should revert to the United States. It was held that the property was subject to State taxation, the Court saying:

> "It would be a very harsh doctrine that would deny the right of the States to tax lands because of a *mere possibility* that they might lapse to the United States. * * * Finally, we are of opinion that the land is not exempt as an agency of the United States. * * * The United States has no present right to the land but merely a personal claim against the corporation, reinforced by a condition. But, furthermore, it seems to us extravagant to say that an independent private corporation for gain, created by a State, is exempt from State taxation either in its corporate person, or its property, because it is employed by the United States, even if the work for which it is employed is important and takes much of its time. *Thomson* v. *Pacific Railroad,* 9 Wall. 579; *Railroad Company* v. *Peniston,* 18 Wall. 5."

The fact that the company is chartered by Congress is not material (*R. R. Co.* v. *Peniston,* 18 Wall. 5, at p. 34).

It is suggested (rather feebly it is true) that because the Farm Loan Banks were given the

power to buy and sell United States bonds (a power that practically every individually and corporation, State or Federal, possesses), they thereby became instrumentalities of the Federal Government and exempt from State taxation. If that argument were sound, would not every corporation and person who had the power to invest in or who invested in Government securities, be exempted with respect to the *balance of their business* from State taxation?

This argument was considered and answered in *Monroe Savings Bank* v. *City of Rochester,* 37 N. Y., 365, 370, in the following language, quoted with approval in *Plummer* v. *Coler,* 178 U. S., 115, 123:

> "It is, however, argued with great ingenuity and skill that, inasmuch as the plaintiffs, among other powers given them, have the right to invest their moneys in United States bonds, their franchises and privileges cannot be taxed by the State. The power thus to invest their money, it is contended, is a franchise for lending to the United States, and therefore cannot be taxed, because such taxation would trench on the power of the United States to borrow. This is stretching the argument too far. * * *
>
> The position, that a franchise granted by the bounty of the State is not taxable, because coupled with that franchise is the privilege of loaning money to the general Government, is not

more untenable than to argue that, because such a franchise enhances the credit of the United States, therefore the Legislature could not repeal the law granting the franchise without violating its constitutional obligation."

The farm mortgages executed *to* the Federal Loan Banks and to the Joint Stock Banks as well as the Farm Loan Banks issued *by* them thereon, and held by private investors, are exclusively instruments of private business.

Can it be contended that they partake in the slightest measure of the characteristics of those properties which have been held to be instrumentalities of the Federal Government and hence exempt from State taxation?

The Farm Loan bonds are neither assets nor liabilities of the United States. It does not promise to pay or guarantee the payment of them. No suit could be brought in the Court of Claims upon them. The money raised on the bonds does not go to the Government.

Congress cannot by its mere declaration, exempt property from State taxation. The exemption, when it exists, arises from the operation of the Constitution upon our dual system of Government.

Congress is now considering the creation of a

similar system of Federal *building loan banks* for the purpose of furnishing money at low rates of interest and on long term mortgages, to enable people to buy and build homes;

> The "indispensable essential of the system" being that "these bonds are to be tax exempt" "because the bonds can not be sold if they are to be subject to taxation," and "that will be doing no more than we did with the Federal Farm Loan Act with regard to mortgages taken by the Federal Land Banks," where "we called them instrumentalities of the Government." (See "Hearings before the Committee on Banking and Currency of the House of Representatives on H. R. 7597," pp. 7, 8.)

The advocates of the Bill avowed with perfect frankness (p. 11):

> "The United States Government is not expected to put 50 cents into this system; they are not called upon to finance it in any way, shape or manner, excepting to the extent of providing a supervision that will see that the system functions properly. *And to provide for tax exemption of their securities,* and, as I said before, * * * to be perfectly frank about it, *we feel that the tax exemption is an essential element of the system,* and in that connection we are justified in making this comparison, that if the Congress of the United States for any reason has seen fit to exempt the bonds of the Farm Loan System *for the purpose of giving easier and larger capital to the farmers* of the United States, we believe we are justified in calling at-

> tention to the fact that the *wage workers* of the cities, towns and villages of the United States * * *" (interrupted).

If the farmers and the home builders are entitled to get money at low rates of interest by exempting the loans and mortgages from State taxation, certainly the importance of manufactures, as shown in Alexander Hamilton's "Report on Manufactures" would fully justify Congress in providing a system of Federal Manufacturing Banks by which all mortgages and bonds on manufacturing establishments would be exempted from State taxation. This could readily be followed by a similar system with respect to irrigation projects, coal mines, logging, etc.; and if the Federal Government can exempt the bonds and mortgages from State taxation, can it not as readily exempt the land itself, for after all, in many States, a mortgage is an *interest* in land. If the Government's argument is sound that the mortgages and bonds are Federal instrumentalities, and thus exempt from State taxation, there is nothing to prevent Congress from destroying the State Governments by successive measures to withdraw from the States all species of property from taxation. That this is a legitimate test of constitutional power is illustrated in

South Carolina v. *United States*, 199 U. S. 437, 454, 455.

The power of the States over liquor and the liquor traffic is absolute.* When, in order to lessen the evils of intoxication, South Carolina took over the liquor traffic and prohibited all sales except those made by itself through a system of dispensaries, this Court held that the whiskey was still subject to a Federal tax, because when a State, even in the exercise of its police power, engages in ordinary private business, the business is not exempted from the Federal taxing power because it is conducted by a State; and that the exemption of State instrumentalities from Federal taxation is limited to those of a strictly governmental character, and does not extend to those used by the State in carrying on an ordinary private business.

It is not necessary to extend this brief by lengthy quotations from Mr. JUSTICE BREWER'S opinion, with which the court is perfectly familiar. It is sufficient to observe that he pointed out the large and growing movement in the country in favor of State management of public utilities, including gas, water, and railroads; that

Bartmeyer v. *Iowa*, 18 Wall., 129; *Beer Co.* v. *Mass.*, 97 U. S. 623; *Kidd* v. *Pearson*, 128 U. S. 1; *Crane* v. *Campbell*, 245 U. S. 304; *Barber* v. *Georgia*, 249 U. S. 254.

the States might take over tobacco, oleomargarine or all businesses, and that if, by doing so, it could exempt the subjects taken over, from Federal taxation, the National government would be crippled.

The same argument applies here. If Congress can withdraw from State taxation the whole field of farm mortgages, it can do the same as to real estate, manufacturing plants, public utilities, mines, private residences, etc.

As pointed out by CHIEF JUSTICE MARSHALL in the *McCulloch* case, reaffirmed in the *South Carolina* case, this is not a case for confidence by one government that the other will not exercise its power of exemption to its fullest extent. The States are entitled here, and now, to insist that Congress shall not drive an entering wedge by exempting farm mortgages, and the private investments based thereon, from State taxation.

In *Flint* v. *Stone Tracy Co.*, 220 U. S., 171, 173, where it was held that the States could not withdraw from the Federal taxing power, corporations of a public nature, it was said:

> "It is no part of the essential governmental functions of a state to provide means of transportation, supply artificial light, water and the like. These objects are often accomplished

through the medium of private corporations, and though the public may derive a benefit from such operations, the companies carrying on such enterprises are, nevertheless, private companies, whose business is prosecuted for private emolument and advantage. For the purpose of taxation they stand upon the same footing as other private corporations upon which special franchises have been conferred. The true distinction is between the attempted taxation of those operations of the states essential to the execution of its governmental functions, and which the state can only do itself, and those activities which are of a private character."

Certainly, *it is no part of the essential governmental functions of the Federal government to provide farmers with money at interest rates lower than they can obtain in the open market.* No matter what indirect benefit the public may derive from farmer prosperity, the companies conferring such prosperity are nevertheless private corporations whose business cannot be exempted from State taxation.

The Farm Loan Banks are engaged exclusively in the ordinary private business of lending on farm mortgages and of selling to the investing public "collateral trust" bonds thereon, just as any private individual or State corporation might do. This business has no sort of public nature or connection with the Federal Gov-

ernment, but is of a wholly private character. It does not in the remotest degree tend to carry into execution any express power of Congress; and hence no implied power exists in Congress to authorize the carrying on of this purely private business.

If this proposition should be disputed, then we ask *what* is the legitimate end within the scope of the Constitution to the accomplishment of which this purely private business is an appropriate means?

A moment's reflection will show that it is impossible to indicate any of the objects entrusted to Congress by the Constitution which are in the remotest degree accomplished by the business of private individuals lending money to land owners on farm mortgages, and selling them to the public, which, after all, is the Farm Loan Banks' only business.

CONCLUSION.

In its last analysis, the questions to be determined are (1) whether the Constitution has endowed Congress with the power to provide for schemes of agricultural, social or industrial improvement calling for the use of large quantities of private capital; and (2) whether Congress, in

its desire to see such schemes successfully realized, can infringe upon the taxing power of the States by exempting therefrom the private capital so provided, thereby furnishing the desired scheme with money at a lower rate of interest, and on more favorable terms, than could otherwise have been secured.

If the principles announced in *Kansas* v. *Colorado* and *South Carolina* v. *United States* are still the law, it is inconceivable that Congress has the power to provide this system of farm mortgage banks, not for the purpose, as in the case of the National Banks or the old Bank of the United States, of carrying out some of the express powers of Congress, nor to enable Federal agencies adequately to perform their functions in view of the new forms of competition (*First National Bank* v. *Union Trust Co.*), but solely for the avowed purpose of enabling farmers to borrow money at low rates, because Congress thinks that people with capital *ought* to be willing to lend it on *farm security*, as cheaply as they lend it on (what the owners of the capital consider) a *safer* form of security.

Undoubtedly farmers have not been able to borrow money at as low rates as well established commercial interests, but this arises from the

very nature of the security offered by the farmers. In *Hammer* v. *Dagenhart*, 247 U. S. 251, it was pointed out that the Constitution did not give Congress any authority to equalize economic conditions by which business done in one State was at a disadvantage compared with that done in another; so, Congress has no authority to equalize economic conditions, between two classes of citizens, with respect to the ability to borrow money from private sources.

If, in order to stimulate agriculture, Congress desires, under its power of appropriation, to lend the public money to farmers at a low rate of interest and easy terms, it is probable that the courts cannot control such action, but the ballot box would quickly stop it.

When, however, Congress, under the alleged guise of the power of appropriation, attempts to accomplish the same result through private capital, *at the expense of the taxing powers of the States*, then, in the language of *Hammer* v. *Dagenhart*:

> "This court has no more important function than that which devolves upon it the obligation to preserve inviolate the constitutional limitations upon the exercise of authority, federal and state, to the end that each may continue to dis-

charge, harmoniously with the other, the duties intrusted to it by the Constitution."

The judgment below should be reversed.

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LOUISVILLE, KY.,
October 11, 1920.